Supreme Court, U.S.
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90-1608
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LENORA B. FULANI, *et al.*,

Petitioners,

vs.

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the laches doctrine be invoked after a presidential election to avoid appellate review of a minor party candidate's claims for declaratory relief and damages based on the violation of her first and fourteenth amendment rights by state officials who granted her major party competitors an unprecedented, partisan, and discriminatory waiver of an absolute ballot access filing deadline, where the candidate had standing to sue, her claims are not moot, she sued prior to the election and promptly after receiving notice of the state officials' failure to enforce the deadline against her opponents, and her alleged delay in filing suit does not prejudice the defendants in any way?

PARTIES TO THE PROCEEDING

The petitioners, who are plaintiffs and appellants below, are Lenora B. Fulani, Mamie Moore, Lenora B. Fulani's Committee for Fair Elections, New Alliance Party, Julie Joy and Mary Forrest.*

The respondents, who are defendants and appellees below, are Joseph H. Hogsett, Secretary of the State of Indiana; the State Election Board of Indiana; Robert D. Orr, Governor of Indiana; and Donald B. Cox, Kevin J. Butler, and John R. Whitaker, Members of the State Election Board of Indiana. In the court of appeals, Carlton E. Curry was intervenor-defendant-appellee.

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* **Rule 29.1 Statement Regarding Petitioners:** None of the petitioners is a corporation.

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IN THE
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October Term, 1990

No.

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Petitioners,

--against--

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Lenora B. Fulani ("Fulani") et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (1a-12a) is reported at 917 F.2d 1028 (7th Cir. 1990). The opinion of the district court (13a-33a) is not reported.

JURISDICTION

The judgment of the court of appeals affirming the district court's granting of motions to dismiss was entered on November 8, 1990. A timely petition for rehearing was denied on January 14, 1991. (34a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and

> to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

§ 3-10-4-5 of the Indiana Code provides in pertinent part:

> **Certification of nominees.** (a) The state chairman of each political party shall certify to the secretary of state the names of the nominees of the party for President and Vice President of the United States and the state of which each nominee is a resident.
>
> * * *
>
> (c) The names of all candidates for presidential electors shall be certified by noon August 1 before the general election. The names of all nominees for President and Vice President of the United States shall be certified by noon September 1 before the general election.

STATEMENT OF THE CASE

Since 1912, independent and minor party candidates for president and other offices have had to satisfy a myriad of onerous ballot access requirements enacted by state legislatures.[1] While this Court has trimmed back some of the requirements for being so burdensome as to violate voters' and candidates' first amendment rights,[2] the extraordinary

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[1] Prior to 1912, there were significant periods of third party electoral activity in the United States. However, after the Socialist Party polled six percent of the presidential vote in 1912 and won some Congressional seats and numerous local offices, "state legislatures began to write or revise ballot-access laws to hinder third-party activity." Note, "Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply," 28 Harv. J. on Legis. 167, 170 (1991).

[2] The Court first addressed the constitutional status of such laws in Williams v. Rhodes, 393 U.S. 23, 34 (1968), where it struck down "the totality of the [State of] Ohio restrictive laws taken as a whole," recognizing that

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effort demanded of independents and minor parties to gather petition signatures, meet early filing deadlines, pay filing fees, and satisfy other preconditions for access to the ballot which do not apply to the Democratic or Republican parties, or their candidates, is a fact of life. However, it has always been assumed that just as these onerous requirements have been strictly enforced against independent candidates and parties, the major parties have been held to compliance with the less burdensome requirements applicable to them.

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[2](...continued)
the right to vote would be infringed if voters were limited to one or two government-approved parties. Id. at 31. Since Williams v. Rhodes, the Court has reviewed various state ballot-access laws that impose more onerous requirements on minor parties than on major parties. Some schemes have been struck down, see, e.g., Anderson v. Celebrezze, 460 U.S. 780 (1983), and others have been upheld, see, e.g., Jenness v. Fortson, 403 U.S. 431 (1971).

Not so in Indiana in 1988. Both the Democratic and Republican parties missed the filing deadline for presidential elector candidates. Rather than routinely rule candidates Bush, Quayle, Dukakis and Bentsen off the ballot, the Indiana Secretary of State quietly ignored the deadline and placed them on the ballot. When the petitioners challenged his action in federal court, instead of rendering an obvious ruling that their rights were being violated by partisan enforcement of the election law, the district court denied them relief. While the court of appeals did not accept the district court's reasoning on the merits, it avoided the merits altogether by rendering a tortured interpretation of the laches doctrine.

Thus, this case presents the Court with a significant development in the

pattern of constitutional challenges to ballot access restrictions which began with Williams v. Rhodes, 393 U.S. 23 (1968). It does not present a facial challenge to a state ballot access law for discriminating against minor parties. Rather, it challenges the preferential enforcement of a ballot access law which is supposed to apply equally to all parties.

In the 1988 presidential election, the only candidates who were legally on the ballot in Indiana for the offices of President and Vice President of the United States were petitioners Fulani and Moore, the candidates of the New Alliance Party. Petitioners commenced the underlying action on October 18, 1988 to challenge the decision of the respondents to list the Democratic and Republican candidates on the 1988

Indiana presidential election ballot, even though the Republican and Democratic candidates for presidential electors were not filed with the Indiana Secretary of State until after the August 1 deadline provided by Indiana Code § 3-10-4-5. The New Alliance Party had met all of the requirements of Indiana law for securing a listing on the ballot, including the timely filing of presidential elector candidates.

With rare exceptions, none of which apply here, strict compliance with candidate filing deadlines has been universally, strictly enforced by the courts of every jurisdiction that has considered them.[3] The consequences of mis-

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[3] The rule in Indiana and in all of the other jurisdictions that have considered the issue is that statutory provisions requiring petitions, certifications, applications for nomination, declarations of candidacy, etc., to be

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[3](...continued)
filed with a specified officer within a specified time period or by a deadline date, are mandatory, and neither the elections officials nor the courts have any discretion to waive strict compliance. The leading Indiana cases are discussed infra at n. 4. The authorities from other jurisdictions are too numerous to be cited herein. They may be found in 25 Am. Jur. 2d Elections, §140, 29 C.J.S. Elections, § 114, Annot 72 A.L.R., 290. Of the multitude of reported decisions on the issue, it appears that only one nineteenth century case does not support the otherwise universal rule. See State ex rel. Fulton v. Licking County, 17 Ohio C.C. 396, 9 Ohio C.D. 427 (1898).

Noncompliance with filing deadlines appears to have been excused only in cases of official estoppel (e.g., reliance on the filing official's erroneous identification of a filing deadline; unavailability of the filing official; the filing official's omission to file a document after it was duly tendered to him, etc.) and cases where a vacancy in office occurs after the filing deadline has passed. See e.g. Re Bayne, 69 Misc. 579, 127 N.Y. Supp. 915 (1910); State ex rel. Mihlbaugh v. Bogart, 53 N.E.2d 75 (Ohio 1943); Clegg v. Bennison, 247 P.2d 614 (Utah 1952); Donohoe v. Shearer, 330 P.2d 316 (Wash. 1958); Cosgriff v. Board of Election Commissioners, 97 Pac. 960 (Cal. 1908), contra, Cowie v. Means, 88 Pac. 485 (Colo. 1907); State ex rel. Smith v.

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[3](...continued)
Marsh, 230 N.W. 99 (Neb. 1930); People ex rel. Simmons v. Haman, 106 N.Y. Supp 312 (1907); Earl v. Lewis, 77 Pac. 235 (Utah 1904), Blackmer v. Hildreth, 63 N.E. 14 (Mass. 1902); Meyers v. Smith, 314 S.W.2d (Tex. 1958); Kilday v. Germany, 163 S.W.2d 184 (Tex. 1942); State ex rel. Elston v. Parish Democratic Executive Committee, 138 S. 857 (La. 1931); State ex rel. Hinjub v. Parish Executive Committee, 138 So. 862 (La. 1931).

No such exceptions are recognized by the Indiana courts, see infra n. 4. More importantly, no such exceptions, nor any exceptional circumstances whatsoever, are present in the instant case.

The justifications for strict enforcement of filing deadlines are the state's interest in preserving the integrity of an electoral process which is orderly, which is governed by statute rather than by the inclinations of election officials, and in which the candidates and voters alike are assured their constitutional rights of due process and equal protection. See e.g. Brodie v. Hook, 121 S.W. 979 (Ky. 1908); Cowie v. Means, supra, Graham v. Wellington, 89 Atl. 232 (Md. 1913); American Party of Texas v. White, 415, U.S. 767, 782 n. 14 (1974), Unity Party v. Wallace, 707 F.2d 59, 63 (2d Cir. 1983) (New York's "legitimate, even compelling interest" in protecting the integrity and efficiency of it's electoral process provided the necessary rational basis for denying an independent candidate access to the bal-

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sing a deadline are invalidation of the candidacy and denial of access to the ballot. The Indiana courts have uncompromisingly enforced such ballot access deadlines, even in cases which are not adjudicated until after the election, where the consequence is the removal from office of a candidate who won the election.[4]

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[3](...continued)
lot for failing to file an acknowledged acceptance of candidacy on time.)

[4] The Indiana courts have made it abundantly clear that any failure to meet a ballot access deadline specified in the election code is absolutely fatal, even where the matter is adjudicated after the election occurs.

In Higgins v. Hale, 476 N.E.2d 95 (Ind. 1985), Republican Party officials failed to hold a meeting to fill a vacancy on the ballot until after the deadline provided in former Indiana Code 3-1-11-10 (Burns Supplement 1984). The Secretary of State nevertheless accepted the candidate who was appointed to fill the vacancy for listing on the ballot. The trial court enjoined the Republican officials from taking any action to place the candidate on the ballot.

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[4](...continued)
Judgment was stayed, and the candidate's name was placed on the ballot pending appeal. On election day, the candidate outpolled her Democratic opponent. Five months after the election, the Indiana Supreme Court ordered the stay of the trial court's judgment dissolved and affirmed the trial court in every respect.

The Court of Appeals of Indiana, First District, followed Higgins v. Hale, supra, in Wilhite v. Mohr, 485 N.E.2d 131 (Ind.App. 1 Dist. 1985), holding that the nomination of a winning candidate for county recorder was void and of no effect because of a failure to comply with the deadline for filling vacancies specified in former Indiana Code 3-1-11-10(d).

In a case involving an independent political party, State ex rel. Socialist Labor Party v. State Election Board, 241 N.E.2d 69 (Ind. 1968), the Socialist Labor Party ("SLP") had timely filed a "loyalty affidavit" which, however, excluded certain language prescribed by former Burns' Indiana Statutes § 29-3812. The Indiana Supreme Court upheld the State Election Board in denying the SLP's nominees for office access to the general election ballot even though an amended affidavit was tendered eight days after the deadline, and even though faulty affidavits had been filed by the SLP and approved "for a period of years." 241 N.E.2d at 75. In holding that the State Election Board was not estopped from rejecting the faulty affi-
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[4](...continued)
davit by its past practice of accepting such affidavits, the Supreme Court stated that "Public officers cannot, by violation of law, bind their successors or the State of Indiana to erroneous and illegal actions. Julian v. State (1895), 140 Ind. 581, 39 N.E. 923," and recited with approval the following language from State ex rel. Welch v. Marion Superior Court, 185 N.E.2d 18, 20 (Ind. 1962):

> the State Election Board is merely an administrative body created by the legislature to perform the specific and limited functions for supervising all elections and administering the election laws of the state * * * [and] adopt and promulgate rules and regulations * * * for that purpose. Section 29-3004, supra. The authority thus vested in the State Election Board does not, under any theory, vest the Board with the power and authority to * * * conduct an election in any manner other than as provided by the election laws of the state as enacted by the legislature which created the board....

The district court below has lent its authority to strict enforcement of Indiana's election law deadlines in Udall v. Bowen, 419 F. Supp. 746, 748 (S.D. Ind. 1976), a case involving a challenge by 1976 presidential primary candidate Morris Udall to the constitu-

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In this jurisprudential context of universal, strict enforcement of ballot

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[4](...continued)
tionality of an Indiana statute requiring the signatures of 500 registered voters from each congressional district as a precondition for access to the primary ballot. The net result was that Udall was kept off the Indiana 1976 presidential primary ballot because of a minor, inadvertent error that caused him to miss the petition filing deadline for 35 of the 5500 signatures required.

The Indiana courts arguably followed a somewhat different standard in decisions rendered long before those discussed herein, namely, that election law requirements are mandatory if their enforcement is sought before an election in a direct proceeding, but are only directory in post-election proceedings, "unless an essential element of the election is affected, or there is an express declaration in the statute that the act is essential to a valid election, or that its omission will render the election void." See e.g. Cave v. Conrad, 216 Ind. 304, 308, 309; (Sup. Ct. Ind. 1939); State ex rel. Harry v. Ice, 207 Ind. 65, 71 (Sup. Ct. Ind. 1934).

This earlier standard is no longer followed in Indiana. Even if it had been applied in the case at bar, the plaintiffs should have prevailed in that they sought enforcement of IC 3-10-4-5(c) in a direct proceeding brought the November 8, 1988 election.

access deadlines, the respondents were obligated to apply Indiana's filing deadline for presidential elector candidates to the similarly-situated New Alliance, Republican and Democratic tickets in a uniform manner. Evenhanded application would have entailed placing the New Alliance candidates on the ballot and disqualifying the Republican and Democratic candidates from the ballot. Instead, the respondents applied the statute differently to classes of people (major and non-major party candidates) who should have been treated alike.

In effect, the respondents gave the Republican and Democratic candidates an unauthorized and unprecedented extension of the filing deadline for presidential elector candidates. Their disparate treatment of the major and minor party

candidates bears no rational relationship to any legitimate state interest and is unconstitutionally partisan.

It is a matter of public record that the electorate is profoundly dissatisfied with the manner in which the major parties and their candidates conducted the 1988 presidential election. Voter turnout was the lowest since 1924. As a matter of policy, the public should be reassured that these parties and candidates are not above the law. If an exception is permitted here to the universal rule of strict enforcement of ballot access deadlines, the public's confidence in the impartial administration of justice will be gravely undermined. The maintenance of public confidence in our system of equity, justice and democracy transcends

the other interests involved in the 1988 or any other presidential election.

Significantly, in Missouri the Libertarian Party faced exactly the same problems as the Republicans and Democrats faced in Indiana, but received opposite treatment by state officials and by the lower federal courts. The Libertarians timely filed 41,499 petition signatures on August 1, 1988, more than two times the support required by statute to qualify as a new political party and to run a presidential candidate. However, instead of certifying the names of their presidential elector candidates on August 1, 1988, they did so on September 7, 1988, still two months before the general election. State election officials enforced the elector deadline strictly against the Libertarians and barred them from plac-

ing their presidential candidate on the Missouri ballot. This strict enforcement of the statute against a minor party was upheld by the Eighth Circuit Court of Appeals. See Manifold v. Blunt, 863 F.2d 1368 (8th Cir. 1988), rehearing en banc denied, 873 F.2d 178 (1989), cert. denied, 110 S.Ct. 242 (1989).

Hence, in the same election one federal circuit upheld strict enforcement of ballot-access filing deadlines against a minor party that had substantially complied with ballot access requirements, while another federal circuit upheld an unprecedented departure from past enforcement of strict compliance in order to accept merely substantial compliance by the two major parties.

It is as if there is a law that "forbids the rich and the poor equally from sleeping under the bridges of Paris," except that when the unanticipated day arrives that a rich man is compelled to sleep under a bridge, the authorities refuse to enforce it against him. Such discriminatory enforcement strikes at the heart of the rule of law.[5]

The Seventh Circuit Court of Appeals held that petitioners had standing to challenge the respondents' deci-

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[5] On the merits of the constitutional issues, petitioners are certainly not opposed to a standard of substantial compliance with ballot access requirements to replace the prevailing state practices of strict enforcement. However, absent such a ruling petitioners believe they minimally are entitled to a declaration of their right not to be subjected to a double standard -- strict compliance for minor party ballot access; substantial compliance for major party ballot access.

sion to place the Democratic and Republican candidates on the ballot; it found that the holding of the election did not moot the petitioners' claims for declaratory relief and damages. However, it avoided a decision on the merits of petitioners' constitutional claims by ruling that they were barred by laches.

Assuming arguendo that the laches doctrine could be a bar to granting petitioners a preliminary injunction ordering the respondents to remove the major party candidates from the ballot before the election, there is no basis for applying laches to prevent the petitioners from obtaining an adjudication of their constitutional claims after the election. There was no evidence, nor even an allegation, that the respondents would be prejudiced in any way in the post-election litigation by reason of

the fact that the petitioners had commenced their suit three weeks before the election rather than four weeks, or five weeks, or six weeks before the election. The respondents' alleged interest in proceeding with the election without changing the ballots was fully satisfied.

The holding of the court below is not only clearly erroneous in terms of laches doctrine; it also violates the principles behind the mootness doctrine enunciated by this Court in Moore v. Ogilvie, 394 U.S. 814 (1969) and its progeny, i.e., that important constitutional issues arising in election contests will not be rendered moot by the holding of the election. While the court below paid lip service to the mootness doctrine by declining to affirm on that grounds, its ill-considered

laches holding evades the principle that a party who presents an Article III case or controversy raising an issue about the constitutionality and fairness of how state officials are conducting election contests should ordinarily be able to obtain a ruling on the merits of her claim.

Accordingly, petitioners respectfully request that this Court grant the writ of certiorari so that it may reverse the ruling on laches and cause a decision on the merits to be reached, either by remanding the case to the court below or by requesting briefing on petitioners' first amendment, fourteenth amendment, and pendent state law claims and deciding the case on the merits on this appeal.

Proceedings Below

Indiana law requires that the names of candidates for presidential electors be certified to (i.e., filed with) the Indiana Secretary of State by August 1 before the general election. Indiana Code § 3-10-4-5.[6] The New Alliance Party met this deadline, but the Republicans did not certify their elector candidates until August 4, and the Democrats did not certify their elector candidates until August 8. The Secre-

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[6] The court of appeals inaccurately describes this process as one in which the names of candidates are certified "by the Indiana Secretary of State." (2a) In fact, it is the responsibility of the political party to certify the candidates for elector to the Secretary of State. Here, the failure of the Secretary of State to certify the Republican and Democratic candidates for presidential electors by the August 1 deadline was wholly incidental to the failure of the Republican and Democratic Parties to certify (i.e., file) their presidential elector candidates with the secretary of state by August 1.

tary of State disregarded the failure of the Republicans and Democrats to meet the strict filing deadline and approved their presidential candidates for placement on the ballot. The Secretary of State did not seek an advisory opinion from the State Attorney General or a declaratory judgment from a state court before granting the major parties this unprecedented waiver, nor he did take any other action that would have made the press or the public generally aware of his irregular decision.

On October 6, 1988, the New Alliance Party learned about the Secretary of State's unpublicized waiver of the filing deadline. On October 13, the New Alliance Party sent a demand letter to the Secretary of State to rescind his action, which was formally denied the next day. On October 18, 1988, three

weeks before the general election, petitioners commenced this action in the United States District Court for the Southern District of Indiana.

The premise of the complaint was that the respondents had violated petitioners' rights under the first and fourteenth amendments of the Constitution, as well as under state law, by intervening in a partisan manner into the presidential election campaign by engaging in an ad hoc, unprecedented enforcement policy of allowing substantial compliance with a precise ballot access filing requirement which resulted in preferential treatment for the Democratic and Republican parties. By way of relief, plaintiffs sought preliminary and permanent injunctions directing the respondents to remove the Democratic and Republican candidates for president and

vice president from the ballot, a declaratory judgment, and money damages. In the district court, petitioners brought on a motion for a preliminary injunction. The respondents opposed the motion and made a motion to dismiss; they were joined by intervening defendant Carlton E. Curry, one of the Republican candidates for presidential electors. On October 25, 1988, the district court denied the preliminary injunction motion and dismissed the complaint, holding that petitioners did not present a case or controversy because their claims allegedly were based on a hypothetical state of facts. (20a-24a). Alternatively, the district court (misapplying constitutional election law precedent) ruled that plaintiffs had failed to prove intentional and purposeful discrimination. (24a-26a) While

referring to laches as a "serious obstacle[] to granting the type of relief requested by plaintiffs," (32a) the court did not ground its dismissal of the complaint on laches doctrine.

Petitioners filed a notice of appeal on October 28, 1988, and brought on before the court of appeals an emergency motion for an injunction pending appeal, which was denied on November 7, 1988. The election was held on November 8, 1988.

Two years later, on November 8, 1990, the court of appeals entered a decision affirming the district court's dismissal of the entire case, including the claims for declaratory relief and damages. First, however, the court of appeals rejected the district court's reasoning that there was no case or controversy presented. It held that the

plaintiffs had standing to sue because the increased competition they faced as a result of the state defendants' allowing the Democrats and Republicans on the ballot was an injury -- an injury that was redressable after the election by declaratory and monetary relief:

> We believe that New Alliance's injury is fairly traceable to the action of the Indiana officials who allowed the Democrats and Republicans on the ballot. A grant of damages would redress the increased outlay of campaign money to meet the competition, and declaratory relief would prevent future violations of the Indiana certification law. Therefore, we hold that the plaintiffs have standing to bring this suit.

(8a).

Second, the court of appeals rejected respondents' post-election arguments of mootness, holding that plaintiff's request for injunctive relief is not moot "because the New Alliance party hopes to field candidates

in future Indiana presidential elections [citations omitted]" and that "In addition, the requests for declaratory relief and money damages present live controversies between the parties and are not moot [citations omitted]." (6a)[7]

However, the court went on to affirm the judgment of dismissal on the grounds of laches. It held that the petitioners were barred from "receiving any relief" (emphasis supplied) (11-12a) because of the disruption to the electoral process that would have been caused by making changes on the ballot. Nowhere did the court of appeals explain, let alone provide any prece-

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[7] Upon review by this Court, the petitioners would also seek a ruling that they are entitled to permanent injunctive relief barring preferential enforcement of filing deadlines in the future.

dent for, the proposition that the alleged disruption to the election created a laches bar to the prosecution of claims for declaratory relief and damages once the election was over. Nor did the court attempt to explain the apparent contradiction between its rationale for granting standing and denying a mootness defense, on the one hand, and saying that there was prejudice to the respondents after the election sufficient to raise a laches bar against an injured plaintiff seeking to press an important constitutional election claim.

REASONS FOR GRANTING THE WRIT

1. The Issues In This Case Are Of National Significance

The 1988 Presidential election crystallized a party realignment in the United States. In the 1950's, 1960's and 1970's there were various small independent parties in the electoral arena, but no stable national independent parties with support from the political mainstream emerged. In the 1980's two national independent parties were established, the Libertarian Party and the New Alliance Party.[8] They have

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[8] In terms of voting, the two most significant independent party presidential candidacies from 1950-1980 were those of George Wallace, who ran on the American Independent Party line in 1968, and John Anderson, who ran on the Unity Party line in 1980. However, neither of those parties ever ran another nationwide presidential candidacy either before or since. By contrast, the Libertarians and New Alliance have been engaging in long-term party building efforts -- the 1992 election

(continued...)

the organizational capacity to run presidential candidates in all 50 states and to qualify for federal primary matching funds.[9] There are now three party sectors in American politics -- the major party sector (Democratic and Republican), the national independent party sector (New Alliance and Libertarian) and the state or multi-state level minor party sector (numerous small parties).

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[8](...continued)
will be the fifth consecutive presidential race for the Libertarians, and the third race for the New Alliance, which was created as a local party as recently as 1979.

The 1990 election also intensified the spotlight on independent politics as two independents were elected to governorships -- Lowell Weicker in Connecticut and Walter Hickel in Alaska; and the first independent was elected to Congress since 1952, Bernie Sanders of Vermont.

[9] The Libertarians, apparently for ideological reasons, have not sought matching funds even though they clearly have the capacity to qualify.

Political parties have no status under the United States Constitution. Unlike the Constitution of the Soviet Union, which provided in Article 6 for a "leading role" in the nation's politics for a particular political party, the United States Constitution mentions political parties neither generically (e.g. "minor" and "major"), nor by name. To the contrary, the first amendment and the equal protection clause of the fourteenth amendment to the Constitution have come to stand for the fundamental proposition that the powers of the state may not be used in a partisan manner to support or oppose particular candidates or parties in electoral politics.

Hence, when this Court found unconstitutional an Ohio statute that would have prevented independent presidential candidate John Anderson from

being on the ballot, Justice Stevens wrote:

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream... [T]he primary values protected by the First Amendment...are served when election campaigns are not monopolized by the existing political parties.

(Emphasis supplied, citations omitted.) Anderson v. Celebrezze, 460 U.S. 780, 794 (1983).

The greater the electoral threat to the dominant two-party system, the greater the pressure to violate constitutional principles by using the levers of government to put greater obstacles in the paths of third party

challenges.[10] The facts of this case,

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[10] A striking example of the increasing efforts of the major parties to exploit their governmental hegemony in order in increase their control over the presidential election campaign was their takeover of the sponsorship of the general election presidential debates in the 1988 election. In 1987, the Democratic and Republican parties created the Commission on Presidential Debates, a Washington, D.C. nonprofit corporation. Although the founders issued press releases saying the purpose of the "bipartisan" organization was to take over control of the presidential debates from the League of Women Voters and to "strengthen the two party system," the Internal Revenue Service granted the organization nonpartisan tax exempt status under I.R.C. §501(c)(3), a status that was a precondition under Federal Election Commission regulations for its eligibility to sponsor federal candidate debates. Cf. Barmann, "Third Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Elections," 23 Colum. J. L. and Soc. Probs. 441 (1990).

Petitioner Fulani challenged that Internal Revenue Service action, but in that case, as in the instant case, Fulani has so far been unable to obtain a ruling from the lower federal courts on the constitutionality of the Internal Revenue Service's enforcement actions. Fulani v. Brady, 729 F. Supp. (D.D.C. 1990), appeal pending, Docket No. 90-5063 (D.C. Cir) (dismissal based on lack

(continued...)

and the court of appeals' legally unsound avoidance of the constitutional issues presented by petitioners below, calls for a reaffirmation by this Court of the principles of fair elections and democracy within our constitutional scheme.

In Williams v. Rhodes, 363 U.S. 23 (1968) and the line of ballot access cases that succeeded it, independent parties made facial challenges to ballot access laws with which they could not comply, or could do so only with an expenditure of resources that would exhaust their ability to carry out an election campaign once they were on the ballot. The instant case presents an important variation on that theme.

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[10] (...continued)
of standing, no ruling on the first amendment claims). Compare Fulani v. League of Women Voters, 882 F.2d 621 (2d Cir. 1989).

Fulani satisfied the ballot access rules not only of Indiana, but of 49 other states and the District of Columbia. It was the Democratic and Republican parties that failed to comply with Indiana law. This case tests the constitutionality of the state officials' double standard of enforcement (strict compliance for independents; substantial compliance for the Democratic and Republican parties).

At this historic juncture in American party politics, it is of national importance to establish that the major parties cannot count on the lower federal courts to use flimsy invocations of justiciability rules or equitable doctrines to insulate from judicial review governmental conduct that allegedly violates the constitutional rights of the major parties' competitors.

Vast sectors of the eligible electorate do not participate in the electoral process because they perceive themselves to be disenfranchised by parties, candidates and officeholders who do not serve their interests. The well-documented public disaffection with the major parties, their presidential candidates and their conduct in the last presidential election season exacerbates the experience of disenfranchisement in the electorate. It is submitted that participatory democracy would not be served if the Republican and Democratic parties and their candidates for highest office are given favored treatment and are exempted from the legal requirements that apply to everyone else.

At the very heart of our system of equity and justice lies the public interest in, and reliance on, the fair,

evenhanded and impartial administration of justice. The Indiana cases insist on strict enforcement of filing deadlines and other ballot access deadlines. So also do a multitude of authorities from other jurisdictions. Virtually every court that has considered the issue has resoundingly upheld strict enforcement. Of course, relatively few of these cases have involved the ballot position of candidates with the stature of Vice President Bush, Governor Dukakis, Senator Quayle and Senator Bentsen. It is submitted that if this Court were to deny the petitioners declaratory relief, thereby treating these gentlemen differently that the many, many lesser candidates who have been denied access to the ballot for failure to meet a deadline, the nation's stake in "equal

justice for all" would be greatly undermined.

2. The Decision Below Conflicts With Decisions of This Court

As previously noted, even if laches could properly have been applied in the courts below to bar the petitioners' application for a preliminary injunction before the election, laches may not properly be applied after the election to preclude an adjudication of the petitioners' constitutional claims.

The court below notes that "Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant," 917 F.2d at 1018, citing Herman v. City of Chicago, 870 F.2d 400, (7th Cir. 1989). However, the court does not explain how this doctrine applies to the instant case. The instant respondents'

interest in proceeding with the election without reprinting the ballots has been fully satisfied; they have not demonstrated and cannot possibly demonstrate that they will be prejudiced in any way in the post-election appellate litigation by reason of the fact that the petitioners commenced their suit only three weeks before the election.

The court of appeals cited four cases in support of its laches holding. Herman v. City of Chicago, supra, is not an election case, and, in fact, the court there held that the plaintiff was not barred by laches from commencing a § 1983 employment discrimination case 19 months after plaintiff had been discharged but five months before the expiration of the statute of limitations.

In each of the three election cases cited by the court, laches was applied once to bar injunctive relief; the merits of plaintiffs claims were decided in each case. Williams v. Rhodes, supra, is not only a leading Supreme Court case deciding the merits of a ballot access constitutional claim, it did affirm the granting of injunctive relief to one plaintiff, the Ohio Independent Party. The laches doctrine was invoked for the limited purpose of denying to the Socialist Labor Party the same injunctive relief granted the Ohio Independent Party, because the Socialist Labor Party had not acted soon enough and the state was prejudiced by the delay relative to injunctive relief.

Similarly, in McCarthy v. Briscoe, 539 F.2d 1353 (5th Cir. 1976), the plaintiff, presidential candidate Eugene

McCarthy, had obtained a declaratory judgment that the state ballot access statute in Texas as applied to his candidacy was unconstitutional. The sole issue on appeal was whether McCarthy could be granted injunctive relief at that point in time. While the court expressed its regrets about "standing by and permitting this incomprehensible policy to achieve its apparent objective," 539 F.2d at 1355, it found that the prejudice to the general election process would be too great and denied injunctive relief.

Finally, in Kay v. Austin, 621 F. 2d 809 (6th Cir. 1980), the court decided the ballot access challenge on the merits, finding that the Michigan statute was not unconstitutionally vague; alternatively, it held on laches grounds that injunctive relief could not

have been granted at that time even if the claim had merit. Hence, far from being supportive authority, Kay contradicts the holding of the instant court of appeals. In a pre-election case the Sixth Circuit decided the merits of the ballot access claim even though laches applied to the claim for injunctive relief. In the instant case, the Seventh Circuit used laches as a pretext to avoid deciding the merits of the case after the election.

Counsel's research has not disclosed any precedent for the Seventh Circuit's laches holding. We have found no federal election litigation in which laches was invoked in post-election litigation as a grounds for denying declaratory relief that was initially requested prior to the election.

By its misapplication of laches doctrine the decision below contravenes a line of decisions of this Court applying mootness analysis (not laches) to the post-election appellate litigation of claims for declaratory and injunctive relief which were initially asserted prior to the election. An exception to mootness for claims which are "capable of repetition, yet evading review," was first stated by this Court in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

The seminal case for applying mootness doctrine to election litigation is Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (suit for declaratory and injunctive relief by independent candidates for presidential electors against members of Illinois' State Electoral Board who denied certification to plaintiffs

in 1968 election for failure to comply with ballot access statute which discriminated in favor of residents of sparsely settled counties and against residents of populous counties in the exercise of their voting rights):

> Appellees urged in a motion to dismiss that since the November 5, 1968 election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden . . . allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections .... The problem is therefore "capable of repetition, yet evading review," Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515. The need for its resolution thus reflects a continuing controversy in the federal-state area where our "one man, one vote" decisions have thrust. We turn then to the merits.

The Court has subsequently applied the exception to many other election-related controversies, further elaborating its significance. In Storer v. Brown, 415

U.S. 724, 736 n. 8 (1973), the Court explained:[11]

> The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in

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[11] See also, Goosby v. Osser, 409 U.S. 512, 514 (1973) (class action by prisoners denied right to vote was not moot even though several elections had been held since action was filed); Rosario v. Rockefeller, 410 U.S. 752, 756 (1973) (suit for declaratory relief from "delayed enrollment" statute affecting right to vote in primaries was not moot even though particular primary election was completed and petitioners would be eligible to vote in next scheduled primary); Babbitt v. Farm Workers, 442 U.S. 289, 300-301 (1979) (suit for declaratory and injunctive relief against statute which, inter alia, specified procedures for the election of employee bargaining representatives); Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 115 n. 13 (1981) (post-election appeal of state court declaratory judgment upholding constitutionality of state system for selecting delegates to national convention which violated national party rules); Meyer v. Grant, 485 U.S. 414, 417 n. 2 (1988) (holding of election did not moot action for declaratory judgment that statutory prohibition against paying circulators of initiative petitions is unconstitutional).

> the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Like the petitioners in the cases just cited, the instant petitioners present the Court with a controversy which could not be fully adjudicated prior to the election in question, which is capable of repetition in future elections, and the constitutional significance of which calls for its resolution even though the election which gave rise to it has been held.

3. The Decision Below Is Inconsistent With A Prior Decision In The Eighth Circuit

August 1, 1988 was not only the deadline for all parties to certify to the Indiana Secretary of State their

presidential electors; in Missouri it was the deadline for new political parties to file a petition for new party status, and for the certification of their electors. The Democratic and Republican parties missed the Indiana deadline but state officials put their candidates on the ballot anyway. The Libertarians missed the Missouri deadline, and state officials kept their presidential candidate off the ballot. The Seventh Circuit upheld the former action; the Eighth Circuit upheld the latter. Manifold v. Blunt, supra.[12]

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[12] Missouri, unlike Indiana, did not have a uniform deadline for certifying presidential electors. New parties had to file that information on August 1, but established parties had until the third Tuesday prior to the election -- more than two additional months. Even though the Libertarians duly filed on August 1 more than twice as many petition signatures as required to gain ballot access, and filed presidential electors on September 7, 1988, weeks

(continued...)

These two appeal court decisions are not contradictory in narrow jurisprudential terms. The Seventh Circuit, after all, did not reach the equal protection or first amendment claims (although the district court did). However, the decisions are inconsistent in practice. If left undisturbed, these two decisions -- involving identical filing deadlines -- can only be widely understood by ballot access lawyers and state officials as a judicially condoned double standard for the enforcement of ballot access deadlines. Not only are many differences in ballot access requirements that more heavily burden independent parties constitutionally

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[12] (...continued)
before the deadline for established parties, the Eighth Circuit (with one dissent) would not find that the Libertarians had substantially complied, or that the August 1 deadline as to electors was unconstitutional.

acceptable, it is also possible to continue enforcing the more stringent rules against independent parties while keeping open the option of granting ad hoc and unprecedented waivers to the major parties if ever they miss the deadlines applicable to them.

It is respectfully submitted that this Court should pierce the smokescreen of the unsound laches holding of the Seventh Circuit and go to the constitutional heart of the issue presented by these 1988 election cases. A ruling is needed that reaffirms the requirement of nonpartisan enforcement of election laws in the 1992 presidential election. It is a violation of the constitutional rights of the candidates and supporters of independent parties to force them to compete in the electoral arena on unequal terms.

CONCLUSION

For the reasons stated above, the writ should be granted.

Respectfully submitted,

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April 14, 1991

APPENDIX

In the
UNITED STATES COURT OF APPELS
For the Seventh Circuit

No. 88-3122
LENORA B. FULANI, MAMIE MOORE, LENORA B. FULANI'S COMMITTEE FOR FAIR ELECTIONS, et al.,

Plaintiff-Appellants,

v.

JOSEPH H. HOGSETT*, in his official capacity as Secretary of the State of Indiana, STATE ELECTION BOARD OF INDIANA, EVAN BAYH, Governor of Indiana, et al.,

Defendants-Appellees,

and

CARLTON E. CURRY,

Intervening Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division, No. 88 C 1230--**James E. Noland**, Senior District Judge.

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* Pursuant to Fed. R. App. P. 43(c)(1), we have substituted the original appellees' successor to this proceeding.

Submitted October 15** --Decided November 8, 1990.

Before CUMMINGS and POSNER, Circuit Judges, and PELL, Senior Circuit Judge.

PELL, Senior Circuit Judge. In the 1988 presidential election, plaintiffs Lenora Fulani and Mamie Moore were the respective candidates for President and Vice President of the United States on behalf of the New Alliance Party. They appeared on the presidential ballot in Indiana and forty-nine other states along with the Democratic and Republican candidates. The other plaintiffs in this case include Fulani's election

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** After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

committee, the New Alliance party, a campaign worker, and an Indiana voter who supported the New Alliance party (collectively "New Alliance"). New Alliance claims that Indiana violated 42 U.S.C. § 1983 when state officials allowed both the Democratic and Republican presidential candidates on the ballot after the Indiana Secretary of State failed to certify their electoral candidates by August 1, 1988. The district court granted the defendant's motion to dismiss the case prior to the election, and New Alliance appealed.

The Democrats and Republicans selected their candidates for presidential electors at their state party conventions during the summer of 1988. Indiana law also required that the names of these candidates be certified by the Indiana Secretary of State by August 1

before the general election. IND. CODE 3-10-4-5(c). On October 18, 1988, three weeks before the presidential election, Fulani filed this action seeking to remove the Democratic and Republican candidates for President and Vice President from the Indiana ballot. By that time the ballots had already been printed and absentee voting had commenced.

In granting the defendants' motion to dismiss, the district court rejected New Alliance's requests for injunctive relief, declaratory judgement and monetary damages. Regarding the charge that New Alliance would have been treated differently had its electoral candidates not been certified on time, the district court held that this hypothetical problem did not present a case or controversy. The court also stated that there was no equal protection violation

because New Alliance had failed to allege any facts showing with particularity intentional and purposeful discrimination. Given the fact that the New Alliance candidates were listed on the ballot, the court rejected a claim brought pursuant to 42 U.S.C. § 1983, because it failed to present a case or controversy and it failed to show that any action by the state defendants deprived New Alliance of any federally secured right. The court then held that New Alliance made no showing of racial discrimination and also dismissed the plaintiff's pendent state law claims.

The first question on appeal is whether the request for injunctive relief is moot because the 1988 election is now complete. Although brought before the election, the suit is not moot, because the New Alliance party

hopes to field candidates in future Indiana presidential elections. See, e.g. Moore v Ogilvie, 394 U.S. 814, 816 (1969); Hall v. Simcox, 766 F.2d 1171, 1172 (7th Cir.) cert. denied, 474 U.S. 1006 (1985); Gjertsen v. Board of Election Comm'rs, 751 R.2d 199, 202 (7th Cir. 1984). In addition, the requests for declaratory relief and money damages present live controversies between the parties and are not moot. See Brockington v. Rhodes, 396 U.S. 41, 44 (1969).

Another issue is whether the plaintiffs have standing to challenge the action of the Indiana officials. In order to have standing, a plaintiff must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct that is likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 752

(1984). In one sense, the action of the officials allowing the Democrats and Republicans on the ballot did not injure New Alliance because the party was not denied access to the ballot in any way.

The real question is whether the increased competition that New Alliance faced is an injury which gives it sufficient standing to bring the case. We believe it does. On account of the decision by the Indiana officials to allow the two major political parties on the ballot, New Alliance faced increased competition which no doubt required additional campaigning and outlays of funds. Without the Republicans and Democrats on the ballot, New Alliance would have gained additional press exposure and could have conceivably won the Indiana election, no small boon for a relatively obscure party that hoped to

establish a national presence. We believe that New Alliance's injury is fairly traceable to the action of the Indiana officials who allowed the Democrats and Republicans on the ballot. A grant of damages would redress the increased outlay of campaign money to meet the competition, and declaratory relief would prevent future violations of the Indiana certification law. Therefore we hold that the plaintiffs have standing to bring this suit.

The defendants have also raised the defense of laches, arguing that New Alliance was dilatory in commencing its suit and that it should be denied relief. The last late certification occurred on August 8, 1988. New Alliance claims that it received actual notice of the late filing on October 6, investigated the allegation, and sent a

letter on October 13 to Secretary Bayh requesting that the Democrats and Republicans be denied access to the presidential ballot. Bayh denied the request the next day, and New Alliance filed suit on October 18, three weeks before the November 8 general election. On this point, the district court noted:

> the actions of the defendant Secretary of State were taken and available for public inspection in August and early September, 1988. The plaintiffs did not file their complaint until October 18, 1988. As stated previously, the Indiana general election has begun with absentee voting. In this respect the Court believes the defendants present a strong argument for the application of laches.

The question then is whether an election irregularity which has been a matter of public record for eleven weeks prior to an election must be barred when a plaintiff files suit three weeks before the election.

Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. See Herman v. City of Chicago, 870 F.2d 400, 401 (7th Cir. 1989). In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously. See, e.g. Williams v. Rhodes, 393 U.S. 23, 34-35 (1968). As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made. The candidate's and party's claims to be respectively a serious candidate and a serious party with a serious injury become less credible by their having slept on their rights. Kay v. Austin, 621 F.2d 809, 813 (6th Cur. 1980) (laches applied where candidate

waited two weeks after he knew he would not be listed on the ballot to file suit and preliminary work had already been done for election); McCarthy v. Briscoe, 539 F.2d 1353, 1354-55 (5th Cir. 1976) (application for emergency injunctive relief denied where entire election process would be disrupted by lawsuit filed on July 30 seeking ballot access to November presidential election).

In this case, New Alliance waited eleven weeks after the certification irregularities were a matter of public record and two weeks after it received actual notice before filing suit. During this time the state proceeded with its election preparations, printed ballots, and commenced absentee balloting. On the basis of these facts, the failure of New Alliance to press its case when it should have known that an injury

occurred is fatal to it receiving any relief. Three weeks before the election it would have been extremely difficult, if not impossible, for Indiana to provide another set of ballots. Moreover, the confusion that would have attended such a last-minute change would have posed a risk of interference with the rights of other Indiana citizens, in particular the absentee voters. See Williams, U.S. at 35. For this reason we hold that the plaintiffs's claim is barred by laches.

Because of the disposition of the case on laches, we do not need to reach the other issues involving equal protection, section 1983, or pendent jurisdiction. The judgement of the district court is AFFIRMED.

A true Copy:
Teste:_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LENORA B. FULANI, ET AL.	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 88-1230-C
EVAN BAYH, Secretary of State of Indiana, ET AL.	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
CARLTON E. CURRY,	)	
	)	
Intervenor-Defendant.	)	

ORDER OF DISMISSAL

This matter is before the Court on the defendants Evan Bayh, Robert D. Orr, Donald B. Cox, Kevin J. Butler, John R. Whitaker and State Election Board's (the "state defendants") Motion to Dismiss, as well as defendant Carlton E. Curry's (the "intervenor defendant") Motion to Dismiss the Plaintiff's Complaint, and on the plaintiffs' Motions for an Emer-

gency Restraining Order and a Preliminary Injunction. Whereupon the Court, having read the memoranda in support of the motions, and having heard arguments of counsel on the motions, and being duly advised in the premises, hereby GRANTS the defendants' Motions to Dismiss and DISMISSES this action in all respects.

IT IS SO ORDERED.

DATED this 25th day of October, 1988.

JAMES E. NOLAND,
U.S. District Judge

MEMORANDUM ENTRY

The Court heard oral arguments on the pending motions in this case on October 24, 1988. On that date subsequent to oral argument the Court announced in open court its intention to dismiss this action in all respects.

This written entry supplements the Court's ruling from the bench on October 24, 1988.

The facts in this case are simple and not in dispute. A joint stipulation of fact was filed by the parties and acknowledged and received by the Court at oral argument. Plaintiffs Lenora B. Fulani and Mamie Moore are the New Alliance Party's candidates for President and Vice President of the United States, respectively. Plaintiff Julie Joy, a resident of Indianapolis, Indiana, is a registered voter, member of the New Alliance party and a supporter of the Fulani-Moore ticket. Plaintiff Mary Forrest, a resident of Bloomington, Indiana, is a registered voter and a candidate for presidential elector for the New Alliance Party. The state defendants were sued in their official

capacities as officials charged with the administration of elections in Indiana. The Court permitted the intervenor defendant, Carlton E. Curry, a candidate for presidential elector for the Republican Party, to intervene pursuant to Fed. R. Civ. P. 24.

Indiana law requires that the names of all candidates for presidential electors be certified to the Indiana Secretary of State by noon on August 1 before the general election, which is scheduled this year for November 8, 1988. I.C. 3-10-4-5. The candidates for presidential electors of the New Alliance Party were certified prior to August 1, 1988. The names Fulani and Moore as candidates for President and Vice President of the United States appear on the Indiana general election ballot for the November 8, 1988 elec-

tion. The Republican Party candidates for presidential electors were not certified to the Indiana Secretary of State until August 4, 1988. The Democratic Party candidates for presidential electors were not certified to the Indiana Secretary of State until August 8, 1988. The names of Michael Dukakis and Lloyd Bentsen as Democratic candidates for President and Vice President of United States, and similarly the names of George Bush and Dan Quayle as Republican candidates for President and Vice President of the United States, appear on the Indiana general election ballot for the November 8, 1988 election. It is noted at this point that said candidates were duly certified in a separate filing on or before September 1, 1988 as required by Indiana law. I.C. 3-10-4-5(c).

It is conceded that both the Democratic and Republican candidates for presidential electors were properly selected prior to August 1, 1988, under Indiana state law at their respective state party conventions. Through the absentee voter process, voting in the Indiana general election of November 8, 1988 has begun and did begin prior to the date the plaintiffs filed their complaint.

The plaintiffs request a temporary or emergency restraining order, a preliminary and permanent injunction, and in general seek injunctive relief, declaratory judgment and monetary damages alleging various injuries to and deprivations of federal constitutional rights and pendent state law claims.

In their complaint the plaintiffs allege as follows:

> 32. Upon information and belief, had the Fulani-Moore campaign failed to file the New Alliance Party candidates for presidential electors in a timely fashion or failed to comply with the requirements of the Indiana Election Code in any other respect, Fulani and Moore would not have been listed on the Indiana ballot.

Plaintiffs' Complaint at 11. This clause is realleged in each of the plaintiffs' counts or claims for relief.

The Plaintiffs' claims may be grouped fairly into three counts or areas attempting to raise federal jurisdiction of this Court over an Indiana state law claim. In the first count, the plaintiffs claim that the state defendants' actions allowing the two major party candidates names to appear on the ballot without their electors having been certified by August 1, when combined with the plaintiffs' belief and unsupported allegation that the New Alliance Party would have been

treated differently had its electors not been so certified, represents disparate treatment which violates plaintiffs' rights to political speech and equal protection of the laws under the First and Fourteenth Amendments of the Constitution.

This count is dismissed because the plaintiffs' allegations in this regard fail to present the Court with a live dispute for adjudication. Article III requires that causes filed in federal courts contain an actual case or controversy requirement is designed to insure that the federal courts do not issue advisory opinions on situations not before the court. The case or controversy requirement insures vigorous advocacy by parties whose rights are at stake. See McIntyre v. Fallahy, 766 F.2d 1078, 1081 (7th Cir. 1985); J.N.S.,

Inc. v. State of Indiana, 712 F.2d 303, 305 (7th Cir. 1983); Susman v. Lincoln American Corp., 587 F.2d 866, 868 (7th Cir. 1978). The dispute between the parties "must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effects its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." State of Illinois v. General Electric Co., 683 F.2d 206, 209 (7th Cir. 1982) (citation omitted). Further, "to be made indignant by knowing that government is doing something of which one violently disapproves is not the kind of injury that can support a federal suit." American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 268, (7th Cir. 1986) (citation omitted). In this case

the plaintiff has not presented a live case or controversy for adjudication by the Court. The plaintiffs' alleged disparate treatment is premised on a hypothetical situation. The plaintiffs request the Court to act based on the plaintiffs' beliefs of what the state defendants would have done in a hypothetical situation. This case is in a somewhat peculiar posture in that most requests for advisory opinions present prospective hypothetical events. This case, however, combines retrospective or past events with a request for judgment on what might have happened if past events had occurred differently. Regardless of the timing of the hypothetical occurrences, the allegations in this suit do not present an actual case or controversy for adjudication, and

thus the Court is without subject matter jurisdiction to hear this claim.

This count is further dismissed because it fails to present a claim for which relief may be granted under equal protection analysis. The Equal Protection Clause only guarantees like treatment to persons similarly situated. Desris v. City of Kenosha, Wisconsin, 687, F.2d 1117, 1119 (7th Cir. 1982). Fairly characterized, plaintiffs' claim is not that the Indiana statute in question discriminates against classes on its face, but that state officials are applying the statute differently to classes of people who should be treated alike. The plaintiffs claim that the state defendants' actions allowing the two major party candidates' names to appear on the ballot without their electors having been certified by August 1

denies the plaintiffs equal protection of the laws under the Fourteenth Amendment. To the extent this allegation attempts to present a claim because the plaintiffs' candidates were kept off the Indiana general election ballot, it is moot because the plaintiffs' candidates are on the ballot. To the extent that the allegation attempts to present a claim that the plaintiffs' candidates would have been kept off the ballot if the plaintiffs' electors had not been certified by August 1, and the major party candidates would not have been kept off the ballot, thereby attempting to invoke the equal protection clause, it is dismissed because such claim fails to present a case or controversy for adjudication, see above discussion. Further, plaintiffs' broad claim for equal protection fails under these facts

because the plaintiffs fail to allege any facts which would show intentional or purposeful discrimination on the part of the state defendants. As the Seventh Circuit has stated,

> To establish a denial of equal protection a candidate for public office must prove the existence of an intentional or purposeful discrimination by the election authorities in which one class is favored over another. Whether a state statute or regulation violates the Equal Protection clause depends on ". . . the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification." Every minor difference in the application of laws to different groups is not a constitutional violation.

Baum v. Landing, 535 F.2d 1016, 1018-19 (7th Cir. 1976) (citations omitted). This Court concludes that to state a claim for equal protection relief under these facts, the plaintiff must allege and show an intentional and purposeful discrimination by the state defendants

in favoring one class over another. See Sangmeister v. Woodard, 565 F.2d 460, 465 (7th Circuit 1977); see also Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944). While the Court notes the due regard with which suffrage is held as a civil right, see United States v. Olinger, 759 F.2d 1293, 1302-03 (7th Cir. 1985), the Court concludes that the plaintiffs have failed to allege any facts with the particularity of intentional and purposeful discrimination sufficient to invoke the equal protection clause. Therefore the first count is also dismissed under equal protection analysis.

The plaintiffs' second claim for relief attempts to invoke 42 U.S.C. § 1983. Plaintiffs Fulani and Moore allege that the hypothetical disparate treatment described above discriminates

against them as minority party candidates and violates their rights to political speech and to hold "political programs and beliefs" under the First and Fourteenth Amendments. This count is also dismissed because its basis on a hypothetical situation fails to present the Court with a live case or controversy, see discussion above. It is further dismissed because the plaintiffs have failed to show that any action by the state defendants has deprived either plaintiff of a federally secured right. It is well-settled that § 1983 does not create any federal right in and of itself, but provides a vehicle for recovery to plaintiffs who have been deprived of rights secured by the federal Constitution or laws by state officials acting under color of state law. As discussed in the intervenor

defendant's brief in support of motion to dismiss, conclusory allegation are insufficient to state a claim for relief under § 1983. See, e.g., Cohen v. Illinois Institute of Technology, 581 F.2d 658 (7th Cir. 1978). In this case the Court concludes the plaintiffs' assertions fail to state with requisite particularity the deprivations of federally secured rights necessary for recovery. See Lizak v. Kusper, 399 F. Supp. 1270 (N.D. Ill.), aff'd mem., 506 F.2d 1405 (7th Cir. 1974). Indeed, the plaintiffs certified their candidates for presidential electors by August 1 and the names of Fulani and Moore appear on the Indiana general election ballot. The plaintiffs have failed to cite to any case which clearly or by analogy supports their claim for relief under § 1983 based on these facts. In fact, the

plaintiffs have utterly failed to allege any facts or cite any case which shows the state defendants' actions allowing the major party candidates' names to appear on the ballot harm the plaintiffs in any way. Further, while this Court recognizes the rights to free speech and association secured by the First Amendment, and the right to equal protection of the laws under the Fourteenth Amendment, the Court is unable to conclude that the plaintiffs have shown they have been deprived of any right thereunder sufficient to withstand a motion to dismiss their § 1983 claim. Therefore, such claim is dismissed.

The plaintiffs' third count for relief alleges that the state defendants discriminated against plaintiffs Fulani and Moore on account of their race (black) and sex (female) in violation of

the equal protection clause of the Fourteenth Amendment. The record in this case, including the plaintiffs' Complaint, brief in support of motions for injunctions, and affidavits, is totally devoid of any allegations or pleaded facts which raise even an inference of racial or sexual discrimination. There are no representations whatsoever that any state defendant acted to discriminate against either plaintiff on account of her race or sex. The plaintiffs' bald assertions in this regard totally fail in their attempt to implicate federal jurisdiction. The motion to dismiss this count is well-taken and is granted.

The Court's discussions above address all attempts by the plaintiffs to present claims for relief under federal jurisdiction. All such claims

as fairly characterized by the Court have been dismissed. There remains only the plaintiffs' pendent state law claim. In sum it alleges that the state defendants violated Indiana election law by placing the names of the major party candidates for President and Vice President on the Indiana general election ballot for November 8, 1988. However, because the Court has dismissed the claims attempting to invoke federal jurisdiction, no independent federal subject matter jurisdiction remains. Therefore it would appear improper for this Court to exercise pendent jurisdiction over the plaintiffs' state law claim. Thus the Court dismisses this count as well. In sum, the Court has dismissed the Complaint, including all requests for injunctive relief, declar-

atory judgment and monetary damages, in its entirety.

The Court also notes that the actions of the defendant Secretary of State in this case were taken and available for public inspection in August and early September, 1988. The plaintiffs did not file their complaint until October 18, 1988. As stated previously, the Indiana general election has begun with absentee voting. In this respect the Court believes the defendants present a strong argument for the application of laches. The time available for filing this suit earlier, especially prior to the beginning of absentee voting, and the changes in circumstances from early August to late October present serious obstacles to granting the type of relief requested by plaintiffs. The Court need not address

this issue further, however, because as shown above the Court dismisses the Complaint in all respects.

UNITED STATE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 14, 1991

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

LENORA B. FULANI, MAMIE MOORE, LENORA B. FULANI'S COMMITTEE FOR FAIR ELECTIONS, et al.,

Plaintiffs-Appellants,

No. 88-3122 vs.

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, STATE ELECTION BOARD OF INDIANA, EVAN BAYH, Governor of Indiana, et al.,

Defendants-Appellees,

and

CARLTON E. CURRY,

Intervening Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 88 C 1230, **James E. Noland**, Senior District Judge.

ORDER

On consideration of the petition for rehearing filed by plaintiffs-appellants in the above-entitled appeal, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

Supreme Court, U.S.
FILED
MAY 16 1991
OFFICE OF THE CLERK

No. 90-1608

IN THE

Supreme Court of the United States

October Term, 1990

LENORA B. FULANI, *et. al.*,

Petitioners,

vs.

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, *et al.*

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly applied the doctrine of laches to bar relief in this case.

2. Whether the District Court correctly decided that Petitioners failed to present an actual case or controversy, Petitioners failed to allege any facts sufficient to establish a deprivation of their civil rights, and that Petitioners' claim was moot.

PARTIES TO THE PROCEEDINGS

The petitioners, who were plaintiffs and appellants below, are Lenora B. Fulani, Mamie Moore, Lenora B. Fulani's Committee for Fair Elections, New Alliance Party, Julie Joy and Mary Forrest (hereinafter "Fulani Plaintiffs").

The respondents, who were defendants and appellees below, are Joseph H. Hogsett, Secretary of the State of Indiana; the State Election Board of Indiana; Evan Bayh, Governor of Indiana; and Alan Mills, Timothy Durham, and Robert L. Wright, Members of the Indiana State Election Board (hereinafter "State Defendants");[1] and Carlton E. Curry, intervenor-defendant-appellee below.

[1] Prior to the conclusion of this case in the Court of Appeals, all of the original defendants, who were sued in their official capacities only, were succeeded in their respective offices by the above named respondents. Therefore the above respondents were automatically substituted as parties under FED. R. APP. P. 43(C)(1). *See Fulani v. Hogsett*, 917 F.2d 1028 (1990).

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No. 90-1608

IN THE

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LENORA B. FULANI, *et. al.*,

Petitioners,

vs.

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, *et al.*

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Fulani Plaintiffs seek review of the Seventh Circuit's affirmance of the District Court's dismissal of their complaint for declaratory and injunctive relief and damages, filed pursuant to 42 U.S.C.§1983.

B.
COURSE OF PROCEEDING BELOW

Fulani Plaintiffs filed their five count Complaint pursuant to 42 U.S.C. §1983, on October 18, 1988. Petitioners alleged a violation of their right to political speech, equal protection of the law, discrimination against their political program and beliefs, discrimination on the basis of their race and sex, violation of their right to free speech and association, and violation of Indiana election law. State Defendants filed their Motion to Dismiss the Complaint on October 21, 1988. Intervening Defendant, Carlton E. Curry, filed his Motion to Dismiss on October 20, 1988.

On October 25, 1988 the District Court granted the motions to dismiss and dismissed the Complaint in its entirety. The United States Court of Appeals for the Seventh Circuit affirmed the District Court on November 8, 1990.

C.
FACTS RELEVANT TO ISSUE PRESENTED

The pertinent facts of the case were never in dispute and were submitted to the District Court by joint stipulation of the Parties.[2] At the time this suit was initiated Indiana law required that the names of all candidates for presidential electors were to be certified to the Secretary of State by noon on August 1, before the general election. The names of the Presidential and Vice-Presidential candidates had to be certified to the Secretary of State before noon, September 1, before the general election. IC 3-10-4-5(c).[3] App. 16a.

The Fulani Plaintiffs certified the names of their candidates for presidential electors to the Secretary of State prior to

[2] All references to the facts and opinions below are to the appendix contained in the Petition for Writ of Certiorari and are cited to the appropriate page thereof as, "App. a."

[3] The statute has since been amended to require that the names of the electors and the candidates both be certified to the Secretary of State by noon on September 1, preceding the general election. IC 3-10-4-5(c).

August 1, 1988 and certified the names of their candidates for President and Vice-President to the Secretary of State prior to September 1, 1988. App. 16a.

The Republican Party candidates for presidential electors were not certified to the Indiana Secretary of State until August 4, 1988. The Democratic Party candidates for presidential electors were not certified to the Indiana Secretary of State until August 8, 1988. Both the Democratic and Republican Party candidates for presidential electors were however, properly selected under Indiana law at their respective state conventions prior to August 1, 1988. The Presidential and Vice-Presidential candidates for both the Republican and Democratic Parties were duly certified to the Secretary of State prior to the September 1, 1988 deadline. App. 17a.

The names Fulani and Moore as candidates for the New Alliance Party for President and Vice-President of the United States, along with the names of Michael Dukakis and Lloyd Bentson for the Democratic Party and George Bush and Dan Quayle for the Republican Party appeared on the Indiana ballot for the November 8, 1988 general election.

The Fulani Plaintiffs filed suit on October 18, three weeks prior to the polling date for the 1988 presidential election and sought declaratory and injunctive relief to remove the names of both the Republican and Democratic candidates for President and Vice-President from the ballot in Indiana. By that time, the ballots had already been printed and absentee voting had already begun. IC 3-11-4-13; IC 3-11-10-26. The Fulani Plaintiffs also sought monetary damages.

The Fulani Plaintiffs claimed that allowing the Republican and Democratic candidates on the ballot, without their electors having been certified by August 1, violated their right to political speech, to hold political beliefs and espouse programs, and to equal protection under the First and Fourteenth Amendments. The Fulani Plaintiffs also attempted to invoke the court's pendent jurisdiction over a state law claim. The

Fulani Plaintiffs' central claim throughout their Complaint was:

> Upon information and belief, had the Fulani-Moore campaign failed to file the New Alliance Party candidates for presidential electors in a timely fashion or failed to comply with the requirements of the Indiana Election Code in any other respect, Fulani and Moore would not have been listed on the Indiana ballot. App. 19a.

This allegation was realleged in each of the claims for relief.

The District Court found that because the Fulani Plaintiffs' Complaint was premised upon a hypothetical situation about what the State Defendants might have done in a different factual setting, it failed to present the court with an actual case or controversy for adjudication. Therefore, the trial court held that it was without subject matter jurisdiction to hear the case under Article III of the Constitution. The District Court also found that the Complaint failed to present a claim upon which relief could be granted under equal protection analysis because: (1) the claim was moot to the extent that the Fulani Plaintiffs' candidates had in fact been listed on the ballot, (2) due to its hypothetical nature, the claim failed to present an actual case or controversy for adjudication, and (3) the Fulani Plaintiffs failed to allege any facts to show intentional or purposeful discrimination on the part of the State Defendants. The District Court further found that the Fulani Plaintiffs failed to show that any action by the State Defendants deprived the Fulani Plaintiffs of a federally secured right under either the First or the Fourteenth Amendments and failed to allege any facts to show that the State Defendants discriminated against the Fulani Plaintiffs on account of their sex or race. Having found no independent federal subject matter jurisdiction, the District Court dismissed the state law claim. The District Court noted, but did not rule, that given the timing of the suit and the election, the State Defendants presented a strong argument for the application of laches. The District Court dismissed the Complaint in its entirety.

The Fulani Plaintiffs appealed the District Court's decision to the Seventh Circuit. The Seventh Circuit found that the claims for declaratory relief and monetary damages presented a live controversy between the parties and were not moot. The Seventh Circuit further found that the Fulani Plaintiffs had standing to sue. In doing so the Seventh Circuit found that the increased competition the Fulani Plaintiffs had to face was an injury, fairly traceable to the actions of the State Defendants, which could be remedied by an award of damages to redress the increased outlay of campaign money.

However, the Seventh Circuit ruled that the claim was barred by laches. The Seventh Circuit noted that the action taken by the Secretary of State, which formed the basis of the Complaint, was taken and available for public inspection in August and early September, 1988. The Seventh Circuit then held that the failure of the Fulani Plaintiffs to file their Complaint until October 18, 1988, after the ballots were printed and absentee voting had begun, was fatal to their claim for any relief. Because the Seventh Circuit disposed of the case on laches, it did not reach the merits of the other issues involving equal protection, section 1983 or pendent jurisdiction.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE SEVENTH CIRCUIT'S APPLICATION OF LACHES TO BAR ALL RELIEF IN THIS CASE WAS PROPER AND IS CONSISTANT WITH PRIOR DECISIONS OF THIS COURT.

The Seventh Circuit found that the Fulani Plaintiffs' failure to file their Complaint until October 18, 1988, three weeks prior to the November 8 general election, when the actions of the State Defendants were taken and available for public inspection as early as August 1988, prejudiced the State Defendants. The Seventh Circuit noted the extreme difficulty, if not impossibility, of providing another set of ballots at that late date along with the confusion and risk of interference with the rights of the absentee voters as the prejudice caused by the

unwarranted delay. App. 10a-11a. The application of laches in such a case is consistent with this Court's decision in *Williams v. Rhodes*, 393 U.S. 23, 24-35 (1968). While the Seventh Circuit could have addressed the merits of the Complaint for Declaratory Relief, there was no requirement that it do so. The Fulani Plaintiffs were asking the Seventh Circuit to rule on either the constitutionality of the hypothetical set of facts that never took place, nor likely to take place in the future, or a question of purely state law. The Seventh Circuit's failure to address the claim for declaratory relief is certainly not worthy of this Court's review.

II. PETITIONERS' EFFORT TO OBTAIN EQUITABLE RELIEF WITH RESPECT TO THE 1988 ELECTION IS NOW MOOT AND THEIR REQUEST FOR MONETARY DAMAGES IS BARRED BY THE ELEVENTH AMENDMENT.

Before the filing of the appeal to the Seventh Circuit, the 1988 Election was held, presidential electors from Indiana were elected, the electors cast Indiana's twelve Electoral Votes for the Republican nominees for President and Vice-President, the Electoral College as a whole has elected George Bush and Dan Quayle President and Vice-President, and they have now been sworn into those offices.

Hence, to the extent the Fulani Plaintiffs seek review of the denial of their request for injunctive or other equitable relief with respect to the 1988 election, the issue is now moot. *See Giertsen v. Board of Election Commissioners of City of Chicago*, 751 F.2d 199, 202 (7th Cir. 1984) (appeal from injunction preventing enforcement of election law requirement in primary election dismissed as moot, because primary election had been held since the filing of the appeal). *See also Timms v. Metropolitan School District of Wabash County, Indiana*, 722 F.2d 1310, 1314 (7th Cir. 1983) ("It is settled that our jurisdiction requires 'an actual controversy . . . to exist at all stages of the appellate review'") (citation omitted) (affirming dismissal of

handicap discrimination claim under, *inter alia*, 42 U.S.C. §1983, and holding that appeal of request for injunction to prevent child's exclusion from instruction program was mooted when she passed maximum age of program eligibility).

The Fulani Plaintiffs cannot avoid mootness by invoking the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). The circumstances of this case, both the major parties missing the apparent state law deadline for certifying their presidential elector slates to the Secretary of State of Indiana, are so unusual as make it almost inconceivable that they could be replicated in the future. This court has held that a case must satisfy two tests to avoid mootness under the "capable of repetition, yet evading review" doctrine: (1) the challenged action must have been in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party would be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This test, as articulated in *Weinstein v. Bradford*, was applied by the Supreme Court in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979): "Although the first branch of the test is satisfied here, appellant has presented no evidence that the Chicago Board will repeat its allegedly unauthorized actions in the future." *Id.* 440 U.S. at 187. Similarly, the Fulani Plaintiffs in the instant case have made, and can make, absolutely no showing that anything remotely similar to the unique factual circumstances of this case is likely to occur in the future. Hence, the likelihood that the Fulani Plaintiffs will again be subject to the same actions by the State Defendants is nil.

Nor does the existence of a claim for damages revive the case. The State Defendants, of course, recognize that a claim for damages may survive a mootness attack. *Powell v. McCormack*, 395 U.S. 846 (1969). Such a claim, however, may only keep a case alive to the extent of determining whether there is

a viable damage claim. If a valid immunity defense exists, the damage claim will be barred and will not resuscitate the rest of the case. *Chase v. McMasters*, 573 F.2d 1011, 1015, 1020 (8th Cir. 1978). "A determination that the Defendants are immune likewise terminates any sustaining aid from a damages claims." 13A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, §3533.3 "Mootness — Changed Circumstances," at 269 (2nd Ed. 1984). In this case, the State Defendants are sued in their official capacities only. The damage claims against them are, therefore, barred by the Eleventh Amendment to the Constitution of the United States. *Kentucky v. Graham*, 473 U.S. 159 (1985). The Fulani Plaintiffs cannot save their other claims from being mooted by the events subsequent to the filing of this case in the District Court.

The Fulani Plaintiffs may not rely on *Ex parte Young*, 209 U.S. 123 (1908), to avoid the Eleventh Amendment problem under the doctrine that a suit brought against state officials, even in their official capacities, to enjoin them prospectively from enforcing an unconstitutional statute, is not barred by the Eleventh Amendment. This Court, discussing the *Young* case, has noted that "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 (1984). The Court specifically noted, at 465 U.S. at 102-103, that while the *Young* doctrine permitted prospective injunctive relief, it did not extend to retroactive monetary relief, 104 S.Ct. at 909, *citing Edelman v. Jordan*, 415 U.S. 651, 666-667 (1974). Thus, the damage claim is barred by the Eleventh Amendment, and the rest of the Fulani Plaintiffs' case is moot.

III. THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISION OF THE EIGHTH CIRCUIT.

The Fulani Plaintiffs admit that the decision below and the decision in *Manifold v. Blunt*, 863 F.2d 1368 (8th Cir. 1989), *cert. denied*, ____ *U.S.* ____, *110 S.Ct. 242, 107 L.Ed.2d 192 (1989)*, are not contradictory. (Page 50, Petition for Writ Cer-

tiorari). Indeed, *Manifold* dealt with an equal protection challenge to a statute requiring new parties to submit the names of their presidential electors prior to established parties. The Eighth Circuit found that such a requirement did not violate equal protection. No such statute or requirement is present in this case and the issues involved in the two cases are not relevant to one another.

Petitioners are trying to assert that, because Missouri officials chose to strictly enforce their filing deadline for the names of presidential electors, as a matter of federal law Indiana election officials must do the same. The Constitution does not require that each of the states conform to a single method and manner of selecting presidential electors. U.S. CONST. ART. II SECTION 1, CLAUSE 2. Petitioners' alleged conflict between the strict and liberal enforcement of the filing deadlines in Missouri and Indiana simply does not present a significant federal question worthy of this Court's review.

IV. PETITIONERS' ENTIRE CASE RESTED ON CONCLUSORY AND SPECULATIVE ALLEGATIONS BASED UPON A HYPOTHETICAL SET OF FACTS INSUFFICIENT TO INVOKE FEDERAL SUBJECT MATTER JURISDICTION.

The basis for every claim asserted by the Fulani Plaintiffs in this case was their conclusory, speculative and hypothetical allegation that "[u]pon information and belief, had the Fulani-Moore campaign failed to file the New Alliance Party candidates for presidential electors in a timely fashion . . ., Fulani and Moore would not have been listed on the Indiana ballot." App. 19a. The undisputed evidence shows that the New Alliance Party candidates for presidential electors *were* certified in a timely fashion and Fulani and Moore *were* listed on the Indiana ballot. The patently speculative and hypothetical nature of this core allegation demonstrates that the Complaint failed on its face to satisfy the first test of any Federal action namely, presentation of a justiciable case or controversy over

which an Article III court may constitutionally exercise subject matter jurisdiction.

To establish subject matter jurisdiction, a party must establish that an actual case or controversy exists between the plaintiff and defendant. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The controversy between plaintiffs and defendants must be more than imaginary or speculative. There must be a "live and acute controversy" to satisfy Article III standing. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The case or controversy requirement is designed to insure that the federal courts do not issue advisory opinions on situations not before the court. Federal courts may not render "an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937). The rule against "decid[ing] abstract, hypothetical or contingent questions" is "no less strict in a declaratory judgment proceeding than in any other type of suit," *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *see also, Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). To establish an actual controversy "the disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effects it decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Service Commission of Utah, et al. v. Wycoff Co. Inc.*, 344 U.S. 237, 244 (1952).

The hypothetical and advisory nature of the Complaint here is easily discernible. The underlying cause of action was clearly conditioned on events that had not occurred, *i.e.*, the speculative allegation that the respondents "*would* not" have put the Fulani Plaintiffs' candidates for President and Vice-President on the ballot *if* their presidential elector nominees had not been certified by August 1. In fact, the elector nominees *were* so certified and its candidates for President and Vice-President *were* on the ballot.

In most cases, the courts refused to exercise jurisdiction

because the action rested on contingent future events that had not yet occurred and might or might not take place. Here, the Fulani Plaintiffs' action rested soley on speculation about hypothetical past events that concededly did not occur, had no possibility whatever of occurring in the future, and were contradicted by the events that occurred in fact. As the District court correctly concluded:

> The plaintiffs' alleged disparate treatment is premised on a hypothetical situation. The plaintiffs request the Court to act based on the plaintiffs' beliefs of what the defendants would have done in a hypothetical situation. This case is in a somewhat peculiar posture in that most requests for advisory opinions present prospective hypothetical events. This case, however, combines retrospective or past events with a request for judgment on what might have happened if past events had occurred differently. Regardless of the timing of the hypothetical occurrences, the allegations in this suit do not present an actual case or controversy for adjudication, and thus the Court is without subject matter jurisdiction to hear the claim.

App. 22a-23a.

The Fulani Plaintiffs have framed the question that they wish to present to this Court as one concerning the alleged misapplication of laches by the Seventh Circuit to bar declaratory relief. This question, especially in this case, is simply not worthy of this Court's consideration. The reasons and arguments that petitioners advance in favor of granting the writ rest on conclusory and speculative allegations based upon a hypothetical state of facts which is insufficient to invoke federal jurisdiction under Article III of the Constitution. This case is clearly not worthy of review by this Court.

V. PETITIONERS FAILED TO PRESENT ANY CIRCUMSTANCES OR FACTS THAT WOULD ESTABLISH A VIOLATION OF THEIR CIVIL RIGHTS OR OTHERWISE PRESENT A SIGNIFICANT QUESTION OF FEDERAL LAW.

The Fulani Plaintiffs failed to allege any particularized facts to support their conclusory allegation of civil rights deprivations by the State Defendants. Nor could the Fulani Plaintiffs possibly allege any particularized facts, as the basis for all of their claims was pure speculation about what the State Defendants might have done given a totally different set of facts. The District Court properly concluded below that the Fulani Plaintiffs "failed to allege any facts with the particularity of intentional and purposeful discrimination sufficient to invoke the equal protection clause." App. 26a.

This Court previously stated in *Snowden v. Hughes*, 321 U.S. 1 (1944):

> The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination.* *Id.* 321 U.S. at 8.

This Court went on to state:

> The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "willful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequences of the failure to certify, other than that petitioner has been deprived of the nomination and election.

Id. 321 U.S. at 10.

The Fulani Plaintiffs' conclusory allegations about the hypothesized conduct of the State Defendants does not allege the type of invidious discrimination necessary to state a claim for a violation of the equal protection clause under 42 U.S.C. §1983. *Snowden, supra; see also Baum v. Lundig*, 535 F.2d 1016, 1019 (7th Cir. 1976); *Gamza v. Aquirre*, 619 F.2d 449, 454 (5th Cir. 1980).

Leaving aside the hypothetical nature of the allegations, it is clear that the Fulani Plaintiffs did not begin to allege, much less "with particularity," any "intentional and purposeful, overt actions" by the State Defendants that could establish the requisite "element of intentional or purposeful discrimination." Nowhere was there any allegation of any specific facts showing that the State Defendants, in certifying the Republican and Democratic Party Candidates for presidential electors, were intentionally or purposefully discriminating against the Fulani Plaintiffs on the basis of race, sex, national origin, political belief or any other invidious classification conceivably redressable *via* a §1983 action. Nor were there any facts alleged to support any alleged violation of the Fulani Plaintiffs' rights under the First Amendment.

Furthermore, as noted by the District Court, the equal protection claims were without merit because "[t]he Equal Protection Clause only guarantees like treatment to persons similarly situated." App. 23a. Because the presidential elector nominees of those parties involved were not certified at the same time (either all before or all after August 1), the Fulani Plaintiffs' elector nominees were not similarly situated to their major party counterparts for the purposes of an equal protection claim. Had the Republican, Democratic and New Alliance Party presidential elector candidates all been certified on the same date, and had the State Defendants put the major party but not the minor party candidates on the ballot, a complaint alleging equal protection and similar claims might have stated a claim upon which relief could be granted. But it is clear that these events did not take place.

Aside from the hypothetical nature of the claims, the Fulani Plaintiffs misinterpret and misstate Indiana election law. They alleged that "[t]he Indiana cases insist on strict enforcement of filing deadlines and other ballot access deadlines." (Page 39 of Petition for Writ of Certiorari). Petitioners also made this claim below.

Indiana courts would not have necessarily treated the slight delay in advising the Secretary of State of the identity of already duly nominated Republican and Democratic presidential elector candidates (whose names did not even appear on the Indiana ballot) as grounds for precluding Indiana citizens from voting for either of the major party candidates for President and Vice-President in the 1988 Election.

The Indiana Supreme Court has held that an election official's acceptance of candidate filings that fail to comply strictly with statutory requirements will effectively cure the defect if the underlying purposes of the law are fulfilled:

> The town clerk, acting as [the election] board, might doubtless have refused to accept the [nomination] certificate until rendered in due form, *but, having accepted it without objection, and as satisfactory to him, the purpose of the law was fulfilled. It enabled him to place upon the official ballot the names of the several candidates that had actually been nominated*, and which of right should have been placed there; *and, the correct result having been reached, the form of procedure becomes unimportant.*

Jones v. State ex rel. Wilson, 153 Ind. 440, 448-49, 55 N.E. 229, 232 (1899). In the present case, the Indiana Secretary of State likewise accepted "without objection" and as "satisfactory" the certifications of the major party presidential elector candidates "that had been actually nominated" (in this case by their respective State Party Conventions). And, since the names of candidates for electors did not even appear on the Indiana ballot, it is abundantly clear that his doing so fulfilled "the purpose of the law"; *i.e.*, ensuring that elector candidates had in fact been nominated for the Presidential and Vice-Presiden-

tial candidates whose names did appear on the ballot.

Furthermore, Indiana law is clear that even those requirements that may be considered "mandatory" if a challenge is brought *before* election officials have placed a candidate's name on the ballot will not be so viewed *after* ballots are prepared:

> In an action against [election officials], brought before an election, involving the names of the candidates *to be placed* on the ballot by them, the statutory provisions referred to are treated as mandatory, and they will be enjoined from *placing* a name upon the ballot that had not been submitted to them pursuant to the statute, *but after the election commissioners have acted and placed a name upon the ballot*, and after the election, *the provisions of the statue are considered directory only, and the names of candidates will be treated as having been legally placed upon the ballot* by the election board "unless an essential element of the election is affected, or there is an express declaration in the statute that the act is essential to a valid election, or that its omission will render the election void."

Lumm v. Simpson, 207 Ind. 680, 683-84, 194 N.E. 341, 342 (1935) (emphasis added; citations omitted). In this case, the State Defendants had already placed the names of the Republican and Democratic candidates for President and Vice-President on the Indiana ballot. Indeed, since absentee voting in Indiana started before the regular polling date, the 1988 Election was already underway in Indiana when this action was filed.[4]

[4] Plaintiffs' insistence that every provision of every Indiana election statute demands rigid and literal compliance in every circumstance is not advanced by their reliance on *Manifold v. Blunt*, 863 F.2d 1368 (8th Cir. 1988) *cert. denied*, 110 S.Ct. 242 (1989).

The holdings in *Manifold* and similar Federal cases, that a State's strict enforcement of a given election law requirement may be constitutionally *permissible*, scarcely supports any proposition that strict enforcement of the literal requirements of the Indiana filing provision Plaintiffs sought to put at issue here is somehow constitutionally *required*.

Furthermore, the decisions of State officials in Missouri or in any other State other than Indiana about the election statutes of those States have no bearing in any event on the decisions of Indiana State officials on the proper interpretation and application of Indiana election statutes.

Indiana cases also emphasize that the purpose of Indiana election laws is to ensure that voters have a free and fair opportunity to express their collective will, and that election statutes will be liberally construed to achieve that objective:

> the purpose of the law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose.

State ex rel. Harry v. Ice, 207 Ind. 65, 71, 191 N.E. 155, 157 (1934). *Accord, eg., Lumm v. Simpson, supra*, 207 Ind. at 683, 194 N.E. at 342; *Jones v. State ex rel. Wilson, supra*, 153 Ind. at 446, 55 N.E. at 231. Indeed, it is most likely that the Indiana courts would reject, as inimical to the fundamental election law purpose of giving the electorate a free opportunity to choose its political leaders, a draconian statutory construction that would have required the removal of George Bush and Michael Dukakis from the ballot.

If there remains any doubt as to how the Indiana Courts would resolve the state law issue, the Federal Courts must then abstain from deciding the issue under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

The Fulani Plaintiffs failed to allege any facts to establish a violation of their civil rights under either the First or the Fourteenth Amendments or otherwise present a significant question of federal law. Therefore, the Petition for Writ of Certiorari to the Seventh Circuit should be denied, as the District Court correctly decided the case below even if the Seventh Circuit erred in its laches determination.

CONCLUSION

For the foregoing reasons, respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(3)

No. 90-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LENORA B. FULANI, *et al.*,

Petitioners,

vs.

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:

Anderson v. Celebrezze, 460 U.S. 780 (1983) 16

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Other:

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Constitution of the United States, Fourteenth Amendment . . . 9-12

Indiana Code § 3-6-4-1 8

Indiana Code § 3-10-4-5(c) . . . 7, 11

Respondents' Brief in Opposition to Petition for a Writ of Certiorari sets forth five argument points.

Only Points I and III respond directly to the petition. Since no new arguments are raised in the four paragraphs comprising these points, petitioners will not reply to them.

The new arguments raised in Points II and IV are not properly before this Court. These arguments call for reversal of rulings made in this case by the court of appeals and should be presented, if at all, by cross-petition for a writ of certiorari pursuant to Sup. Ct. R. 12.3.

The court of appeals ruled that the holding of the 1988 election did not render this action moot. See petition at 5a-6a. Without even referring to the court of appeals' decision, the respon-

dents, in Point II, repeat their failed argument that this action is moot. Even if this argument had been presented properly by a cross-petition, it would have to be summarily rejected on the merits because the court of appeals' ruling is based on clear and well-settled precedent.

In Point IV, respondents argue that the petitioners did not present an Article III case or controversy because their claims were based on a hypothetical state of facts. Like the mootness argument, this one also contradicts the decision of the court of appeals. The court of appeals considered and rejected the respondent's argument, which was adopted by the district court, that "because the [New Alliance] party was not denied access to the ballot in any way," (petition at 7a) it did not suffer

individualized injury within the meaning of Article III by reason of the fact that the respondents had granted the major parties an unprecedented waiver of the filing deadline and placed the major party candidates on the ballot as well. Instead, the court of appeals found that the petitioners did present an Article III case or controversy because they faced "increased competition" (Id.) that was real, not speculative. Petitioners amplify their comments on this issue below.

In Point V, respondents argue a grounds for dismissal of the complaint on the merits which was not addressed by the court of appeals. For the reasons set forth in their petition, the petitioners believe that this Court should reverse the court of appeals' dismissal based on laches and remand the case for

a ruling by the court of appeals on the merits of petitioners' constitutional and state law claims. This would necessarily include a ruling on the arguments set forth in Point V. However, even though these arguments are being presented prematurely by the respondents in this petition for certiorari proceeding, petitioners reply to them briefly below.

1. Petitioners' claims are in no way hypothetical.

The instant complaint clearly states claims, under the equal protection clause and the first amendment, for discrimination on the basis of political affiliation and belief. Officials of the State of Indiana granted to the major parties an unprecedented waiver of a ballot access filing deadline. The very rules that had been strictly enforced against minor parties in

Indiana and throughout the nation in the modern era[1] of restrictive ballot access statutes and judicial/administrative enforcement policies, suddenly were administratively nullified as soon as a uniform application of the express statutory terms would work a disadvantage to the major parties vis à vis a minor party in a presidential election. Such blatantly partisan conduct by election officials is plainly unconstitutional.

In a crude mischaracterization of the complaint, respondents and the district court argued that "[t]he basis for every claim" (opposition brief at 9)

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[1] Petition footnotes 2 and 3 set forth an overview of legal precedents that reflect the strict enforcement policies in the modern era of ballot access restrictions. It is most revealing that in their opposition brief the respondents cannot cite to a single modern precedent contrary to petitioners' position -- the three cases they cite date from 1899, 1935, and 1934 (opposition brief at 14-16).

asserted by petitioners was a hypothetical allegation in one non-essential paragraph[2] in a 64-paragraph complaint to the effect that petitioners had reason to believe that if they had missed the same filing deadline, they would have been denied access to the ballot. Obviously, this allegation was expressive of the unfairness of the discriminatory practices about which the petitioners complain, but did not allege any fact that was essential to any element of any of the petitioners' claims. For the Court's convenience, petitioners

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[2] The complaint alleges in ¶ 32:

> Upon information and belief, had the Fulani-Moore campaign failed to file the New Alliance Party candidates for presidential electors in a timely fashion or failed to comply with the requirements of the Indiana election code in any other respect, Fulani and Moore would not have been listed on the Indiana ballot.

have set forth excerpts from the instant complaint in the margin.[3]

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[3] The complaint alleges in relevant part:

Introduction

* * *

2. Indiana Code ("IC") 3-10-4-5(c) requires that candidates for presidential electors be certified to (i.e., filed with) the Secretary of State by noon August 1 before the general election. The Bush-Quayle candidates for presidential electors were not certified to the Secretary of State until August 4, 1988. The Dukakis-Bentsen candidates for presidential electors were not certified to the Secretary of State until August 8, 1988. It is settled law that election code filing deadlines are to be strictly enforced. Until now, such deadlines have been strictly enforced in Indiana.

3. Plaintiffs allege that the deadline provided in IC 3-10-4-5(c) must be strictly enforced; that the failure to meet this deadline is fatal to the Bush, Quayle, Dukakis and Bentsen candidacies in Indiana; and that if the Republican and Democratic candidates are permitted to remain on the ballot, Fulani and Moore's candidacies will be irreparably harmed and that rights secured to the plaintiffs by the First and Fourteenth Amendments to the United

(continued...)

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[3](...continued)
States Constitution will be violated.

* * *

13. Defendant State Election Board is charged by IC 3-6-4-1, et. seq., with the administration of elections in Indiana, including the composition of the Indiana ballots. The State Election Board and defendant Evan Bayh, the Secretary of State of Indiana who is also sued in his official capacity, share responsibility for carrying out the provisions of the Indiana Code pertaining to elections.

* * *

COUNT I

* * *

31. The Fulani-Moore campaign complied fully with all of the applicable provisions of the Indiana Election Code . . . and Fulani and Moore are therefore listed on the Indiana ballot.

* * *

33. The Bush-Quayle and Dukakis-Bentsen campaigns were fully informed by the Indiana election code of the requirements for obtaining a listing on the Indiana ballot. The Bush-Quayle and Dukakis-Bentsen campaigns did not comply with such requirements in that the Republican and Democratic candidates

(continued...)

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[3](...continued)
for presidential electors were not timely filed with the Secretary of State. Yet, Bush, Quayle, Dukakis and Bentsen are all listed on the Indiana ballot.

34. This disparate treatment by defendants of the Fulani-Moore campaign, on the one hand, and the Bush-Quayle and Dukakis-Bentsen campaigns on the other hand, violates plaintiffs' rights to political speech and equal protection of the law under the First and Fourteenth Amendments of the Constitution.

COUNT II

* * *

36. This claim is brought under 42 U.S.C. section 1983.

37. Fulani and Moore are minor party candidates for president and vice president of the United States, respectively.

38. Bush and Quayle are major party candidates for president and vice president, as are Dukakis and Bentsen.

39. The disparate treatment accorded by defendants to Fulani and Moore, on the one hand, and to Bush, Quayle, Dukakis and Bentsen on the other hand, discriminates against Fulani and Moore on the basis of their status as minor party candidates in violation of their rights to political speech under the

(continued...)

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[3](...continued)
First and Fourteenth Amendments to the Constitution.

40. This disparate treatment also discriminates against Fulani and Moore on the basis of political program and beliefs in violation of the First and Fourteenth Amendments to the Constitution.

COUNT III

* * *

42. In the 1988 presidential election there are three candidates who are on the ballot in 51 jurisdictions and who qualified for federal primary matching funds. Two are white men; one is a Black woman. This Black woman's candidacy, moreover, poses a threat to the stability of the two-party system, and the connection between her race and the majority of her supporters and potential supporters is directly and integrally related to her ability to pose a threat.

43. Fulani met all of the requirements for being listed on the Indiana ballot, and is therefore listed on the Indiana ballot.

44. Bush and Dukakis did not meet all of the requirements for being listed on the Indiana ballot, but they are listed on the Indiana ballot nevertheless.

(continued...)

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[3](...continued)

45. Defendants have therefore discriminated against Fulani and Moore on the basis of their race and sex in violation of their rights to equal protection of the law under the Fourteenth Amendment to the Constitution.

COUNT IV

* * *

47. This claim is brought pursuant to the pendent jurisdiction of the Court.

* * *

50. Election code filing deadlines are to be strictly enforced, and defendants' failure to enforce the deadline provided in IC 3-10-4-5(c) is a violation of Indiana law.

51. An actual controversy exists between plaintiffs Fulani and Moore and the defendants, and plaintiffs have no adequate remedy at law to rectify their losses and alleviate the harm to them.

* * *

53. Fulani has demanded timely action by the defendants, but none has been taken.

54. The failure and refusal of the State Election Board and the Secretary of State to disqualify the Republican

(continued...)

Notwithstanding the great emphasis that the district court and the respondents placed on this tenuous argument, the court of appeals did not even address it explicitly, much less base its holding on it. Moreover, as discussed supra, the court of appeals'

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[3](...continued)
and Democratic candidates for presidential electors or remove Bush, Quayle, Dukakis and Bentsen's names from the Indiana ballot, constitute a failure by the defendants to perform their respective ministerial duties under law to enforce the Indiana election code, a violation of Indiana law and a violation of plaintiffs' rights to freedom of speech and association, and to equal protection of the laws under the First and Fourteenth Amendments to the Constitution.

COUNT V

* * *

57. Defendants' failure to disqualify the Republican and Democratic candidates from the ballot in a timely manner has caused plaintiffs Fulani, Moore, LBFCFE and the New Alliance Party to suffer damages in the sum of one million dollars ($1,000,000).

holding that the complaint presents a case or controversy, and that the petitioners had standing, is inconsistent with the respondents' assertions that this case is about speculation rather than about serious charges of partisan interference by government officials in an election competition.

2. Petitioners have stated claims upon which relief can be granted.

The specific, intentional, purposeful act of discrimination by the respondents of which the petitioners complain is placing the Republican and Democratic candidates on the ballot despite the failure of the major parties to file their candidates for presidential electors on time, in an historical and jurisprudential context of universal, strict enforcement of ballot access

filing deadlines in Indiana and everywhere else.

Petitioners Fulani and Moore should not have been required to compete for votes, support and resources with opposing candidates who were not legally on the Indiana ballot. The respondents' failure to remove the Republican and Democratic candidates for president and vice president from the ballot abridged petitioners' constitutional rights to equal participation in the election process free from arbitrary government action or inaction that favors the political strength of some persons and/or parties relative to others. See Moore v. Ogilvie, 394 U.S. 814 (1969).

The New Alliance, Republican and Democratic candidates for president and vice president were similarly situated in all respects material to equal pro-

tection analysis: They were candidates for the same offices, in the same election, in the State of Indiana, and were all subject to the August 1 deadline for certifying presidential elector candidates.

The respondents were obligated to apply the presidential-elector filing requirement to the three similarly-situated tickets in a uniform manner. Evenhanded application of the filing requirement would have entailed placing the New Alliance candidates on the ballot and disqualifying the Republican and Democratic candidates from the ballot. Instead, however, the respondents applied the statute differently to classes of people (major and non-major party candidates) who should have been treated alike.

Petitioners' constitutional claims are grounded in a blending of first amendment and equal protection principles. Under well-settled precedents, the petitioners do not have to establish that the respondents' actions were taken with invidious discriminatory intent. Rather, once an infringement of petitioners' first amendment interests is shown, the burden shifts to the respondents to show a compelling justification. See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 786 n. 7 (1983); see also, Board of Education v. Pico, 457 U.S. 853, 870-871 (1982) (discretion may not be exercised in a partisan manner).

In short, petitioners have stated prima facie constitutional violations in their allegations of intentional conduct by state officials in which they discri-

minated against petitioners and in favor of their electoral adversaries on the basis of partisan political criteria.[4]

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[4] The unconstitutional partisan biases in the respondents' thought and conduct are so ingrained that they are expressed in the formulation of their arguments in the very briefing in which they are attempting to deny that they perpetrated purposeful discrimination. For example, respondents state at page 14 of their Opposition Brief:

> Indiana courts would not have necessarily treated the slight delay in advising the Secretary of State of the identity of already duly nominated Republican and Democratic presidential elector candidates (whose names did not even appear on the Indiana ballot) as grounds for precluding Indiana citizens from voting for either of the major party candidates for President and Vice-President in the 1988 Election.

Ironically, in this passage the respondents are confirming the very subject of "speculation" for which they have excoriated the plaintiffs. They are speculating that the Indiana courts would have approved a waiver of the filing deadline "for either of the major party candidates" (emphasis supplied). Respondents do not even attempt to speculate that the Indiana courts would have treated a "slight delay" by a minor party candidate in like manner. The

(continued...)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 3, 1991

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[4](...continued)
operative factor is not preventing a slight delay from keeping any otherwise qualified candidate off the ballot, but rather preventing a slight delay from keeping a Republican or Democratic candidate off the ballot.

Hence, by speculating about what the Indiana courts may have ruled, the respondents are trying to legitimize respondents' own use of a partisan criterion (the major or minor party affiliation of the affected candidate) for determining how strictly to enforce the election laws.